

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ASTELLAS INSTITUTE FOR
REGENERATIVE MEDICINE,

Plaintiff,

Civil Action
No. 17-CV-12239-ADB

v.

August 12, 2020

IMSTEM BIOTECHNOLOGY, INC.,
et al.

Defendants.

Pages 1 to 38

TRANSCRIPT OF HEARING VIA ZOOM VIDEOCONFERENCE
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT

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P R O C E E D I N G S

(The following proceedings were held via Zoom videoconference before the Honorable Allison D. Burroughs, United States District Judge, United States District Court, District of Massachusetts, on August 12, 2020.)

THE CLERK: This is civil action 17-12239. Astellas versus ImStem Biotechnology. Will counsel identify themselves for the record.

MR. FRAZIER: This is David Frazier from Latham & Watkins for the Astellas plaintiffs. I'm joined today by my partner Mike Morin. Also I have Reba Rabenstein and Yi Sun also from Latham. We have our client representative Andrea Tiglio, and she's an associate general counsel for Astellas.

MR. SHANNON: Good morning, Your Honor. Tim Shannon of Verrill Dana for defendants. I'm joined here today by my colleagues, Martha Gaythwaite, Ben Stern and an associate who has not yet appeared in the case but is observing today, Travis Waller.

THE COURT: We are scheduled today for a final pretrial conference, but there's a motion pending keeping the evidence open indefinitely. So I'd like to start with that because that will obviously impact whether or not we need to have the final pretrial. I am not prepared to leave the evidence open indefinitely. I understand the problem and the challenges of COVID, but I just don't think it's fair to

1 leave the evidence open in a way that let's people have so
2 much time to figure out what happens next. So given that I'm
3 not willing to leave it open indefinitely, where does that
4 leave us?

5 MR. FRAZIER: Well, Your Honor, this is David
6 Frazier for Astellas. I think that the issue is that an
7 indefinitely delay then -- if the alternative is an
8 indefinitely delay, then that leads us to the same place,
9 that it's just something we can't go that far. I think the
10 cases that are cited in the memoranda are in accord with
11 that.

12 There have been certainly situations, witnesses get
13 sick. You know, if there's a foreseeable end to the illness,
14 that's one thing. But really I think the main point here is
15 that this is not really so much a COVID issue as much as it
16 is an international relations immigration issue. As I
17 understand it, the problem is that if these witnesses leave
18 their jurisdiction in order to go someplace where they can
19 testify remotely, they won't be able to return.

20 I don't think we can sit by and wait for
21 international relations between the United States and China
22 to improve to a point where they would be able to return to
23 their location. So that's our primary concern.

24 The other point is, without pointing a lot of
25 fingers, this is the type of thing that is perfectly

1 foreseeable. It's something that from the start we've known
2 these witnesses live halfway around the world, that they live
3 in China where the rules may be different. And so the point
4 is that this is something that is foreseen by the federal
5 rules. Witnesses become unavailable.

6 They've both been deposed extensively. We can have
7 a fair trial without them. Their testimony is largely
8 overlapping with the testimony of witnesses who will be
9 available live. So I really do think that we can proceed and
10 have a full and fair trial and get the full statements from
11 these witnesses with the record that's been developed.

12 Just finally, along those lines, I just point out
13 that in their motion, ImStem never makes a specific proffer
14 of what exactly it is that these individuals are going to say
15 that was not included in the depositions or is not going to
16 be covered by Dr. Wong. And I think absent that kind of a
17 showing, it's particularly inappropriate to continue the
18 trial indefinitely merely on the basis of a generalization
19 that it wouldn't be fair for them to proceed just on the
20 depositions.

21 THE COURT: I'm happy to make that kind of proffer.
22 What I'm disinclined to do is have just an open-ended
23 continuance. If you told me that someone was having cancer
24 treatment or something for a month or whatever, I would hold
25 it open. The scenario that's been outlined is years. I'm

1 just not prepared to do that. I am open to alternatives.
2 I'm happy to require them to make a proffer. Mr. Shannon,
3 where are you? What's your view on this?

4 I don't see him on mute, but I can't hear him
5 either. Karen, is he muted?

6 THE CLERK: I don't think so.

7 THE COURT: Does someone else want to speak for the
8 defendant?

9 MS. GAYTHWAITE: Your Honor, this is Martha
10 Gaythwaite, in terms of while Mr. Shannon's technological
11 problems are being solved, we're not really asking for an
12 open-ended continuance. We recognize the Court's concerns
13 and plaintiff's concerns. What we would request, Your Honor,
14 is if we could begin the trial and revisit the issue in the
15 middle of September. We may have a better definition in
16 terms of both the COVID situation and the travel restrictions
17 that are imposed because of the COVID.

18 So again, Your Honor, we recognize the issues. We
19 are prepared to go forward with the trial. In terms of what
20 we're talking about is Dr. Xu is an actual party in this
21 case. He is the inventor. It's his genius, frankly, that
22 brought about this discovery and this invention. And it
23 would be fundamentally unfair from our view not to allow him
24 to explain how he came out with this process and how he ended
25 up coming up with the technology for the patent.

1 Again he was deposed, but he was subject to
2 questions by plaintiff's counsel, Attorney Shannon and
3 Attorney Stern didn't have an opportunity to ask him the
4 questions that they planned to ask him on direct in terms of
5 the genesis of the idea, how he went about his work. And
6 again he's a named party, Your Honor. So we're not looking
7 for an open-ended continuance, but we would ask the Court's
8 indulgence to revisit this in mid September.

9 THE COURT: I read the briefs, and I understand
10 that there might not be subpoena authority, that it will be
11 difficult to compel someone from another country to testify
12 depending on the rules. He can't lock himself in his bedroom
13 and be on the screen with us?

14 MS. GAYTHWAITE: Apparently, Your Honor, Chinese
15 law forbids that and Macao law forbids that. Otherwise that
16 would have been what would happen. The only reason he would
17 need to travel to Hong Kong or Viet Nam or someplace else is
18 simply because we don't want to have our client violate the
19 law.

20 THE COURT: Your proposal is that we start the
21 trial and revisit it in the middle?

22 MS. GAYTHWAITE: Yes, Your Honor. We are not
23 asking for a continuance of the trial recognizing that
24 everybody has worked very hard to reserve this time. So
25 we're prepared to go forward. But we do think that we have

1 critical witnesses in Dr. Men and Dr. Xu.

2 THE COURT: If we get mid trial and then you tell
3 me that they're not going to be available for another year, I
4 am not going to hold the evidence open.

5 MR. SHANNON: Is my audio working?

6 THE COURT: Now we can hear you but very faintly.

7 MR. SHANNON: I'm going to try my headset. Can you
8 hear me now?

9 THE COURT: It's still faint. Do you have a volume
10 control you can turn up? I'm wondering if that is the issue.

11 MR. SHANNON: I'll turn it up as high as I can.
12 How is that?

13 THE COURT: It's better.

14 MR. SHANNON: If I could just add to what Attorney
15 Gaythwaite argued on our behalf. Your Honor, may I?

16 THE COURT: Sure.

17 MR. SHANNON: As a starting point, Astellas has not
18 contested that Dr. Xu and Dr. Men cannot come full stop.
19 They were banned in April. They were banned in June, and
20 they are banned now. That's been true all along. The fact
21 that we've discovered it now doesn't change the fact that
22 they were not available and are not available.

23 We've been trying very hard to move this case
24 along. We've tried to make accommodations. It was
25 originally their suggestion that Dr. Xu and Dr. Men appear by

1 video. In an effort to keep the case going, we agreed to
2 that. When we found out a week before our June conference
3 that they were going to go for a bench trial, we relented.
4 There are still plenty of impediments and shortcomings
5 arising from video, particularly where our witnesses are
6 twelve time zones away, but we agreed to it in an effort to
7 keep the case moving.

8 We are very interested in keeping the case moving.
9 At the same time, at the same time, Dr. Xu is a named
10 defendant. His property rights are at risk both defensively
11 and offensively. His financial stake is at risk. And I
12 don't credit Astellas' contention that he's not an important
13 witness because they deposed him twice. That's an important
14 witness.

15 He is the senior scientist, the head of the Stem
16 Cell Institute at the University of Connecticut, Dr. Wong's
17 supervisor, the originator of many ideas and a coordinator on
18 all of them. It's his rights that are at stake. We
19 understand the Court's reluctance to keep this case open
20 forever. But again, I would have to dispute something that
21 counsel said.

22 This is very much a coronavirus issue. It's the
23 COVID issue. We're not replying on political whims of Hong
24 Kong, for example, if that's what he's alluding to. There
25 are plenty of countries that our clients could get to to

1 testify. Unfortunately China and Macao are not among them.
2 We've looked at Viet Nam, Thailand, Mongolia, Philippines.
3 There are options. They just need to get back into China,
4 and that is a function of coronavirus. Not politics with the
5 United States, just the coronavirus. That's a three-six
6 month problem, not a two-year problem.

7 While we are prepared to start with the trial, and
8 I understand the Court's position that the Court does not
9 want it keep the case open forever, we are asking for some
10 leeway to try to find the earliest opportunity to have
11 Dr. Xu, in particular, less so Dr. Men. He's a lesser
12 concern. I think both sides would agree. For a trial to
13 proceed without a named defendant in the midst of a global
14 pandemic we think would be unfair.

15 I'm sorry if I sound like I'm shouting. I
16 apologize for that.

17 THE COURT: You're fine. Not to worry. I'm
18 willing to hold the trial on the dates that we've held aside,
19 and I'm willing to continue the trial. But what I'm not
20 willing to do is hold the trial, and where it's expected to
21 be a bench decision -- I want to make a decision while the
22 evidence is relatively fresh in my mind and in my law Clerk's
23 mind. And I'm not going to put it off indefinitely.

24 I'm willing to revisit it in September in the
25 middle of the trial if that's what you want to do but

1 understanding I am not going to put it off indefinitely. I
2 don't think it's fair to me. I don't think it's fair to my
3 law clerk. I also don't think it's fair to the parties to
4 expect me to listen to a trial and make a billion other
5 decisions and then come back to this one. I am not willing
6 to put myself or my staff in that position. I'm just not.

7 MR. SHANNON: Your Honor, may I follow up in
8 response to that?

9 THE COURT: Yes.

10 MR. SHANNON: We understand completely, and that is
11 a perfectly reasonable, legitimate judicial consideration. I
12 would like the opportunity, if I may, I think it makes sense
13 for perhaps for us to continue, as Attorney Gaythwaite just
14 suggested, that we continue the pretrial conference today. I
15 would like to reserve conferring with my client because
16 Dr. Xu would be -- his absence would not only affect the
17 group as a whole, but I want to make sure he's comfortable
18 with the notion of the trial going forward without him, if
19 that is a possibility.

20 So I think as a practical matter, we should
21 continue with the conference today, but I'd like, for
22 example, 48 hours to confer with my client before we fully
23 come to rest on that question or at least be able to raise it
24 again and revisit it with the Court knowing that I have not
25 yet had a chance to confer with my client about the Court's

1 position.

2 THE COURT: I'm fine with that. I am not
3 scheduling anything else for this time. I am willing to wait
4 and defer the decision on when and if we start. So that's
5 not a problem.

6 MR. SHANNON: Okay.

7 THE COURT: In terms of the rest of the final
8 pretrial, it's not a traditional final pretrial because none
9 of us have ever done this before. It is my intention to
10 hopefully be in my office while the evidence is being
11 presented. We'll see if that's possible or it's not. I may
12 be in and out of my office. We will be very controlled by
13 technology issues and witness order and all that, we'll just
14 take it as it comes. Because whether this is an
15 international relation issues or COVID issues, I'm sensitive
16 to the fact that technology is going to make many challenges
17 for all of us.

18 That being said, I am envisioning -- I guess I told
19 you last time, and I will stick by it, but I will be flexible
20 on the time, the hours that we're sitting. Why don't you
21 guys tell me what you want to do, what you see the issues are
22 that we need to sort out before we start this trial.

23 MR. FRAZIER: This is David Frazier. I'm going to
24 hand it over to my partner, Mr. Morin, at this point. I
25 think we have a way of changing the camera to him.

1 MR. MORIN: I'm going to try, Your Honor. Good
2 morning, Your Honor. This is Mike Morin from Latham &
3 Watkins on behalf of the plaintiffs. I haven't appeared
4 before you in the past. Judge Burroughs, it's nice to be
5 here. We appreciate your time.

6 There are three different issues that we'd like to
7 address on the plaintiff's side that we think are important
8 to sort out before we press forward towards trial. Two of
9 them have to do with the procedures for the trial and were
10 the ones I intended to raise.

11 But we have an additional one that came up, Your
12 Honor, in Monday, in ImStem's pretrial brief. And that is on
13 page 50 of that brief they make a brand-new argument that the
14 state law claims here, Your Honor, are preempted. This
15 court, Massachusetts court, both Judge Saylor and Judge
16 Hillman of the First Circuit have all made it very clear that
17 preemption isn't an affirmative defense.

18 Preemption was never raised in this case for the
19 almost three years that the case has gone on. The first time
20 the words appeared was on Monday. It is not pled as an
21 affirmative defense. The case started, like I said, three
22 years ago. It wasn't in their initial pleadings. It wasn't
23 in any of their pleadings. And it showed up for the very
24 first time on Monday, five weeks before trial. They have
25 several pages on why they contend -- they're wrong on the

1 merits, but the point is it's not in the case, and we'd just
2 ask for that to be obviously set aside. It's an affirmative
3 defense that was never pled.

4 Like I said we had our law clerks search for the
5 word preemption, and it didn't appear in this case until
6 Monday. So that's the first thing. And then we can talk
7 about the sequencing and order of issues for trial.

8 I've met a number of the attorneys on the other
9 side. Obviously I think we'll work together collectively on
10 trying to make this case go as smoothly as possible. But
11 that's the one threshold issue I'd like to address before we
12 get to the issues on the presentation for trial.

13 MR. SHANNON: May I be heard on that, Your Honor?

14 THE COURT: Sure.

15 MR. SHANNON: This issue was just raised --
16 Astellas's objection was raised by email a half hour before
17 this conference. We considered and still consider the
18 preemption defense to be a legal defense. It's not listed
19 among the affirmative defenses in Rule 8. We think it is
20 arguably jurisdictional but, in any event, legal. Very
21 interested to look at the case law that is cited. If the
22 Court has previously determined that it's an affirmative
23 defense that needs to be pled, then we'll address that then.

24 I would flag again, this is just based on 30
25 minutes of consideration, but it's not clear to us exactly

1 why they contend or the Court would contend it's an
2 affirmative defense. There's no real evidence to be gathered
3 with respect to it. It's a purely legal question. So I am
4 not sure it fits the sort of standard flavor of affirmative
5 defense. I'm happy to look at the case law that they have
6 and address it upon seeing it.

7 But in the first instance, we think it's a legal
8 defense. We put it in as a legal defense. We could have
9 raised it in summary judgment. We decided not to throw the
10 kitchen sink at you and led with the arguments we thought
11 were cleanest and easiest at that time. They have not really
12 pushed facts in any direction that would lead us to believe
13 that branching isn't still a viable legal defense arguing as
14 they have in their trial brief that this is all just one ball
15 of the same facts.

16 If so, we think this is a preemption defense. But
17 again, happy to look at whatever briefs and cases they send
18 to us. My only request is if the Court entertains briefing,
19 which would be fine with us, we'd like to put a short page
20 limit on it. There's been a lot of briefing in this case.
21 It seems to us this could be a five-pager, and we could turn
22 it around in a week. With that scale of discussions, we
23 could put it before the Court properly. I'm not sure that we
24 can or should hash it out now. To the extent the Court wants
25 briefing, we'd request that it be targeted.

1 THE COURT: I have no idea what this issue is, and
2 I haven't read the trial briefs yet. I'm happy to have the
3 briefing done. I guess you would start, Mr. Shannon. You
4 can do five pages and they can respond with five pages.

5 MR. SHANNON: Your Honor, perhaps it makes sense as
6 established as the aggrieved party to put in the brief first?
7 Did I miss that?

8 THE COURT: It came up in -- you put it in your
9 pretrial brief that you were going to. It should be their
10 brief first, right?

11 MR. SHANNON: Exactly. Just to throw a schedule
12 out there, if they want to give us five pages in a week, we
13 can respond three days later.

14 THE COURT: That sounds fine. All right with you,
15 Mr. Frazier?

16 MR. FRAZIER: Yes, Your Honor.

17 THE COURT: All right. Next.

18 MR. MORIN: Two other issues. One has to do with
19 the presentation of and time for trial. Your Honor, we
20 understand that you've set aside two weeks for trial. We're
21 the plaintiffs. We bear the burden of proof on most of the
22 issues. We're fully prepared to get this done within two
23 weeks. We have proposed that each side be allocated 20 total
24 hours to make sure that we can hit that two-week period of
25 time. That would include openings, closings, direct, cross,

1 whatever the party wants to do. We're not married to that.
2 But of course, Your Honor, we're trying to make things smooth
3 for the Court and make sure we get done within the two-week
4 period of time.

5 We were surprised when we got from the other side a
6 list of their witnesses and their time allocations. That's
7 on page 17 of their trial brief. On their side alone they
8 have proposed 44 and a half hours of live testimony plus two
9 hours of played video depositions. So 46 and a half hours
10 plus openings and closings. So I guess they want to use 50
11 hours on their side. That would be 100 hours total if we get
12 equal time.

13 That would be a four- or six-week trial. We're
14 concerned about that. We'd like some guidance on that.
15 We're willing, like I said, as plaintiffs to live with the
16 time allocation to make sure we get things done within the
17 two week period of time. But they have almost tripled really
18 what would be reasonable in a two week period of time
19 especially within the constraints of Zoom and doing things
20 remotely. We'd like the Court's guidance on that.

21 Like I said, we'd be willing to live with whatever
22 time parameters you'd like us on us. But especially given
23 the situation that giving each side a certain number of hours
24 may be the fair and equitable way to do it. Of course we
25 defer to the Court. What we do know is they have witnesses,

1 and we're also -- we're concerned that our friends on the
2 other side may try to exceed the scope of their expert
3 reports. Because, for example, they have witnesses who have
4 25 total pages of substantive expert reports, yet they're
5 proposing five-hour directs, which again, doesn't make any
6 sense. They should be done in an hour with that kind of
7 disclosure.

8 We are just seeking some guidance from the Court on
9 that and making sure that things are reasonable and equitable
10 for both sides.

11 MR. SHANNON: May I?

12 THE COURT: Go ahead.

13 MR. SHANNON: I'm going to try my computer audio.
14 I feel guilty shouting into my headset.

15 THE COURT: You're not shouting. It sounds fine.

16 MR. SHANNON: Can you hear me now? Okay. Great.
17 Your Honor, just a couple of points. We put out this list of
18 witnesses so everybody would see who we're going to call, and
19 this is the intended order which we think gives the Court and
20 the other side guidance. We think having something
21 resembling a schedule is helpful.

22 For the individual estimates, we erred high. And
23 we dropped a footnote to that effect because we wanted to
24 include the uncertainties of Zoom. And that will be
25 particularly at the beginning of the trial as we're all

1 working through exhibit handling, which I suspect is
2 Astellas' third point, and we're prepared to talk about that.
3 We actually have done a little more practicing with it. With
4 just a little more practice, we've gone it down to be quite
5 smooth, and it will depend on how the Court wants to handle
6 it with the Clerk.

7 We've overestimated each of these witnesses to make
8 sure we have a buffer in all of those regards. The other
9 reason we put in high estimates on each of these, Your Honor,
10 is because we weren't sure what the Court's practice was with
11 respect to estimating and number of hours per given witness
12 if the Court would then hold us to exactly that number of
13 hours for that witness even if that witness would turn out to
14 be richer or more important or more voluminous than expected.

15 We don't expect the overall trial to require the
16 number of hours that we put down. We'd be happy to ratchet
17 back the estimate overall, to sort of ratchet all of them
18 down to reflect that. I think we can get close to 20 hours.
19 I think 25 might be better, but we're certainly prepared to
20 move and to accommodate. We don't want this trial to go on
21 for six weeks at all, and we don't think it needs to.

22 We want to make sure we had enough cushion built in
23 so if an individual witness turned out to be longer or
24 required more cross than expected, we weren't going to get
25 snapped with we estimated an hour, and in an hour and five

1 minutes we had to sit down. There's a little bit of cushion,
2 maybe a fair amount of cushion, built in in that respect.
3 The individual estimates are high. As a result the
4 collective is high, but we think we can bring it back down
5 to -- I put out 25 or 30. I'm certainly willing to move on
6 that.

7 THE COURT: Mr. Frazier is right that we can expect
8 to get in about 20 hours in a week. And if you're talking
9 about two weeks, that's about 20 hours per. I also am
10 sensitive to the technology issues and various other things
11 that might come up because of COVID and the international
12 aspects of this case and the fact that it's our first time
13 any of us are trying to do a bench trial any of this.

14 I'm willing to let you go over a little bit, but
15 this isn't going to be like a three- or four- or six-week
16 trial. I just haven't allowed for that. And I'm not going
17 to shut you off if you've estimated an hour for a witness and
18 it goes to an hour and 15 minutes or an hour and a half. But
19 when it starts to be like two hours or four hours, you've got
20 to accommodate that by shortening up a different witness.

21 You have two weeks to try the case. I'm willing to
22 try some longer days or maybe go a little bit over, but we're
23 really talking about two weeks. If you want me to put 25
24 hours each side, if that gives you some guidance, I'm willing
25 to do that. That's probably more than two weeks. I'll let

1 you go over a little bit, but we're not going to turn it into
2 a six-week extravaganza.

3 MR. SHANNON: If you give us 25 hours, we'll make
4 it happen.

5 THE COURT: 25 hours, Mr. Frazier?

6 MR. MORIN: This is Mike Morin. 25 hours sounds
7 fine per side. What we would propose to include with it is
8 openings and closings and examinations that anyone does with
9 witnesses, and I think that will help us get through
10 efficiently what I'm sure our friends on the other side are
11 used to for most trials that we have. The other question I
12 have, which is really more for the Court, is I'm sure both
13 sides, and I know from their disclosures, would like to play
14 you, Your Honor, some of the video testimony kind of live to
15 make sure you have context.

16 I would think that would count against whatever
17 side is playing the video to make sure we pick and choose our
18 best stuff, Your Honor. For the remainder of the deposition
19 testimony, how would the Court like to receive that? In
20 other words, we might play, since it's a bench trial, 10
21 percent live of the video testimony that we have entered into
22 the record and to refer to in briefings and the like.

23 Would you like to just kind of accept as part of
24 the record the remainder of the designated deposition
25 testimony either in multimedia and/or in written form? How

1 would the Court prefer to receive the testimony that we're
2 not playing live for Your Honor?

3 THE COURT: What are my choices?

4 MR. MORIN: What I would propose, and I think our
5 friends would probably agree with, is, like I said, the stuff
6 that we play in terms of video that we play be counted
7 against the hours, but that everything else that the parties
8 want to designate and put in, we could send you in written
9 form. And we could also send you, if you're interested in
10 listening or watching live, sending you multimedia as well so
11 you'll have it at your disposal. And then we'll agree that
12 the designated testimony would be part of the record. But of
13 course I leave that to Your Honor and your preferred
14 practice.

15 THE COURT: That all sounds fine. I definitely
16 want the written. If you want to send the multimedia along
17 with it, if there's someplace that we find we need to watch
18 for intonation, we can do that, but I am not going to watch
19 it all. That's fine to make it part of the record, but like
20 a jury, I am not promising you I'm going to go back and read
21 all of that deposition transcript. If there's something that
22 is cited in a brief or referred to in testimony, I will go
23 back and look at that if I think it's important, but I am
24 not -- I am not going to read it all just because I have it.

25 MR. MORIN: We totally understand, Your Honor. We

1 wouldn't expect you to. I would think both sides on the
2 things we think are really important would cull it out in
3 expert testimony, by plaintiff video or by referring to it in
4 the briefs. We're not trying to do a document dump on you,
5 but at the same time we want to make things efficient for you
6 and make sure we don't take too much of your time live by
7 trying to read everything into the record.

8 If that's good with Your Honor, it sounds like it's
9 okay with the other side, that's how we proceed there.

10 MR. SHANNON: It's not entirely okay with the other
11 side, Your Honor. May I?

12 THE COURT: Yes.

13 MR. SHANNON: We're mindful of a document dump, and
14 we're mindful of the fact that they've designated tons of
15 deposition testimony. Dr. Xu, Dr. Men, Dr. Lu. Having just
16 told the Court that this can all be done quickly and they
17 only need 20 hours, to then dump ten more hours of video
18 testimony on you strikes us as a little bit of a work around.

19 And we would instead suggest if there's any video
20 that they want played, it should be played in their time
21 which, of course, is your time as well. I'm mindful of there
22 not being a back door.

23 THE COURT: Mr. Shannon, they can have a back door,
24 but -- I don't care what you dump on me. But I just made it
25 perfectly clear that if it is not played in front of my face,

1 you cannot count on the fact that I'm going to read it or
2 look at it or have any exposure to it. Dump away, but
3 understand that the only thing you can be certain I'm going
4 to see and be certain I'm going to consider is what is
5 presented in front of me.

6 MR. SHANNON: Okay.

7 THE COURT: It's just like a jury. You dump on
8 that stuff on them, they send it to the back room, and you
9 have no idea whether they open it or not.

10 MR. SHANNON: Understood. Thank you, Your Honor.
11 Astellas, you have one more issue, and then I've got a
12 couple.

13 MR. MORIN: We did. The last thing, Your Honor,
14 there are other disputes that the parties have, but I would
15 think you'd expect us to work out things like times of
16 exchanges and things. We will do that with the other side.
17 But the other dispute has to do with the identification of
18 exhibits to be used with witnesses in direct examination,
19 Your Honor. We have proposed that three days before a
20 witness takes the stand on direct that the exhibits, the
21 identity of the exhibits to be used with that direct witness,
22 be identified to the other party.

23 I haven't been involved in a case in ten years
24 where we haven't done that to try to give notice to the other
25 side of what exhibits are going to be used so we can work out

1 any evidentiary issues, without bothering Your Honor, between
2 ourselves, negotiate those out so that we hopefully don't
3 have to present them to you or hold up the examination of the
4 witnesses.

5 The other side doesn't want to do that. They claim
6 that that would be too expensive for some reason, which I
7 don't really understand, because that's just providing a list
8 that says we intend to use Exhibits 87, 112, 180, whatever it
9 is, the list. But it certainly is important for us to try to
10 work out any evidentiary things in advance.

11 The other side says that they don't intend to
12 actually hold on to their objections and make those
13 objections later on, but unless they're willing to drop them
14 all ahead of time, we don't know that for sure. The other
15 thing is is that I mentioned a concern earlier, their experts
16 by and large, other than the patents in suit and the
17 pleadings in the case, hardly refer to any exhibits at all.
18 I have lists of them. The main witness other than the
19 patents in the case cites to two other total documents.

20 If we have a list of ahead of time of what they're
21 planning to use with their experts, we can also try to
22 resolve whether they're trying to go outside, either side, I
23 should throw that in also, trying to go outside the scope of
24 their expert report. So at the end of the day, all that we
25 ask is that on direct examination, obviously not cross, that

1 the parties identify ahead of time the exhibits they intend
2 to use in direct, and that will make your life easier because
3 we can address any disputes that we may have prior to the
4 examination of the witnesses. Again I haven't seen a case
5 where we haven't done that since I can last recall.

6 MR. SHANNON: Your Honor, our objection to this is
7 several fold. We're perfectly fine with the idea of showing
8 them an exhibit list the night before. That's fine. We're
9 not trying to spring anything on anyone. I think morning of
10 is common, but we're okay with night before. What we're not
11 okay with, Your Honor, is the sort of baroque multi-layered
12 process that they laid out where three days before you give a
13 list; two days before there's objections; day before there's
14 a meet and confer and those are constantly layering on top of
15 each other.

16 So just to illustrate the effect, by the time we
17 take our first witness on the first day of our case-in-chief,
18 assuming we have just one witness per day, A-B-C-D on days
19 one, two, three, four, very simplest case possible, we would
20 be presenting A, serving exhibits for D, receiving objections
21 for C, and having a meet and confer on B. The opportunity
22 for error and mistake is enormous. We think a --

23 THE COURT: Stop. Exhibits two days before. We'll
24 hash out objections on the record if we have to.

25 MR. MORIN: Perfect, Your Honor.

1 MR. SHANNON: Your Honor, we've got a few on our
2 side that we'd like to raise if we may.

3 THE COURT: Go ahead.

4 MR. SHANNON: Relatedly, Astellas in their pretrial
5 proposed that the parties mail boxes of cross examination
6 documents to witnesses two days in advance, to be received
7 two days in advance.

8 MR. MORIN: I'm holding up my hand because we'll do
9 the electronic thing. I should have worked that out with you
10 before taking the judge's time. We can use electronic
11 documents for cross examination. That's fine.

12 MR. SHANNON: Great. Thank you. If you have no
13 objection, Your Honor, I'd like to turn to the next issue.

14 THE COURT: Go.

15 MR. SHANNON: Exhibits in general. Now, it's
16 particularly true for cross, but we just want to flag the
17 issue of presentation of exhibits in general. There are two
18 ways we think we can do it. Let me just lay them out and
19 maybe give the pros and cons of each because we think there
20 are pros and cons of each.

21 One is to push, for the examining attorney to push
22 the exhibit into the chat room and then everyone receives it
23 at the same time. The witness downloads it, looks at it,
24 talks to it. And there's a very nice feature here in Zoom if
25 you minimize your Zoom window, if you just click the little

1 flat bar in the upper right-hand corner, it all collapses
2 down to just one window of the person speaking, and that can
3 be superimposed on the document that the witness has right
4 there resident on the desktop.

5 We've done these with most of these. We've done
6 these with exemplar exhibits. I'm happy to do it right now
7 if the Court wants to see how it works. The basic idea is
8 the examining attorney pushes it into the chat room,
9 publishes to everyone at the same time. And then witness
10 pulls down his or her own copy. That's one option. That's
11 one general mechanism.

12 The other general mechanism, Your Honor, is to
13 simply share screens. That is, if I'm the examining
14 attorney, I'd have the exhibit resident on my computer, and
15 I'd share my screen with everyone else. And the Clerk of
16 course will be hosting so she can control the sharing.

17 THE COURT: Are you asking for my preference on
18 this, or are you trying to make me make a decision so
19 everybody is doing the same thing?

20 MR. SHANNON: Both.

21 THE COURT: I don't care. And as far as I'm
22 concerned, you don't have to do the same thing. I'm happy to
23 just take it as it comes.

24 MR. SHANNON: Okay. That's useful guidance. We
25 can work with that. We can work with that. There is the

1 small mechanical question that I do have to trouble you with,
2 Your Honor, and that is if we exchange exhibits beforehand
3 and we have resolved objections but there are still a couple
4 of lingering objections, I think what may make sense is for
5 us to publish it to you or just the Clerk, have you rule on
6 it and then revert to the normal process --

7 If I may just back up. I think most exhibits will
8 go in without objections. Astellas objected to literally
9 two-thirds of all the exhibits. We objected to a third. I
10 suspect at trial those numbers are going to go way way way
11 down. I'm not waiving anything now, but I fully expect them
12 all to go down. And in that case, the ordinary course is the
13 sort of publishing that I just described.

14 If there are some where there's an objection, we
15 just need to publish it to the Clerk and have you look at it,
16 talk about it, without having the witness see it. And I just
17 wanted to flag that step and see if the Court had any strong
18 feelings one way or the other.

19 THE COURT: I don't. You can even email me the
20 documents. We can manage this.

21 MR. MORIN: Your Honor, with Your Honor's blessing,
22 of course, you're going to run your court how you'd like, to
23 state the obvious, but with Your Honor's blessing we always
24 felt if there are lingering objections, which we hope they're
25 not, to hopefully address them with you before the witness

1 takes the stand. They're going to be given the list two days
2 before the witness, so hopefully I imagine before the witness
3 takes the stand, again we defer to Your Honor, but we might
4 address any issues before we resume, and we'd try to work out
5 the things so we're not interrupting the witness just before
6 the witness takes the stand. I think we can all work all
7 that out at trial.

8 THE COURT: That's fine. I'm happy to take 15
9 minutes at the beginning of each day and go through exhibits.

10 MR. SHANNON: Okay. Great. Your Honor, just a
11 couple more issues in this same vein. We'd ask that the
12 demonstratives, we'd like to publish those the day before
13 rather than two days before.

14 MR. MORIN: That's fine.

15 MR. SHANNON: Great. Those are dynamic. And then
16 finally, Your Honor, time zone accommodation. Our experts
17 are two time zones away. And Dr. Men and Dr. Xu, who again
18 we don't think will be available but might be, are 12 time
19 zones away. So without pinning exact times now, we propose
20 in general late morning start for our experts, if possible,
21 and a very very early morning start for Dr. Xu and Dr. Men,
22 if they're able to get to Hong Kong to testify.

23 THE COURT: Let's take it as it comes, but I'm
24 willing to do that. Is that it? Do we need to meet again
25 before trial? Do you guys want to have one more? Or do you

1 want to say we'll start at whatever, we'll pick a time on the
2 first morning of trial and go?

3 MR. FRAZIER: Why don't we say we can go on the
4 morning of trial, that the parties will notify the Court. We
5 think that there are issues that need to be hashed out in one
6 more conference. We have one issue maybe along those lines,
7 is that we have some technical things that we need to run by
8 the Court's IT staff and just wanted some guidance about who
9 we should be trying to communicate with there to make sure
10 we're up and running and ready to go.

11 THE COURT: Karen, will you let them know who they
12 should be talking to.

13 THE CLERK: Yes. They can email me.

14 THE COURT: Karen, what's the first date of trial
15 we decided on? Is it the 14th?

16 THE CLERK: I think it was the 14th.

17 THE COURT: Because the public schools are so
18 discombobulated right now, the 14th may be my kids' first day
19 of school. I would like to go for a 10:00 start that day so
20 I can get them off, seeing as it's their first day.

21 MR. SHANNON: Great. Your Honor, can I flag two
22 small issues as well? First, as we flagged back in June, one
23 of our experts, our damages expert Green is on trial in Texas
24 for a portion of the time, and I'll defer to Ben if he wants
25 to chime in. He knows Bill's schedule better than I do. As

1 we flagged the time he's got trial scheduled, in fact he has
2 a couple. A couple of those moved around. That's still very
3 much in flux. There's a chance he might have to fall outside
4 the two-week period. We're hoping very much that he doesn't
5 have to. We'd ask everyone including Astellas to be flexible
6 to possibly take him out of order if we needed.

7 MR. MORIN: Your Honor, I can see taking him out of
8 order within the two weeks. A, the Texas courts have been --
9 they just postponed the Big Apple case. I suspect it may not
10 be an issue by the time we get there. But B, I suspect even
11 if we take him out of order, meaning not in the order he was
12 identified in, we should be able to do him sometime within
13 those two weeks.

14 He's clearly not testifying for two weeks straight
15 in Texas, and he can do it remotely. I think we can take
16 this up as it goes to trial. We may object to it being
17 outside the trial period. We may not object to them doing it
18 out of the normal sequence or even during our case-in-chief
19 if that's all that we can accommodate. I think we'd probably
20 be okay with that.

21 It's a bench trial rather than the jury trial.
22 We're confident in the Court's ability to compartmentalize
23 things.

24 THE COURT: We'll take it as it comes. I'm happy
25 to take him out of order. I'm happy to break up his

1 testimony if that's what we need to do. I'm happy to, if
2 this trial goes a little bit over two weeks, take him at the
3 end. But again I'm not going to hold the evidence open for
4 big chunks of time to accommodate experts. I doubt that the
5 trials in Texas are going forward, and I doubt that he's
6 going to need to testify for two weeks. I'm with Mr. Morin,
7 and I'm confident we can sort it out as we go.

8 MR. SHANNON: Your Honor, I don't want to overstate
9 the concern. I just want to flag it.

10 THE COURT: Got it.

11 MR. SHANNON: Finally, Your Honor, it's a bench
12 trial. There is a lot of paper. It's unclear to us, do you
13 want five minutes of primer? Do you want an hour long
14 stem-winder?

15 THE COURT: Up to you. You have 25 hours. Do what
16 you want.

17 MR. SHANNON: Okay.

18 MR. MORIN: And, Your Honor, along those lines just
19 very briefly, we noticed in Your Honor's preferences you talk
20 about how you generally are not a big fan of chalks in the
21 openings, but if the parties agree to them, we can use them.
22 It strikes me especially in a Zoom trial and a trial with
23 some technology that the PowerPoints from both sides may be
24 useful to you. I want to make sure that's okay with you so
25 we don't disappoint when we start the trial. It would seem

1 like in this case they might be useful.

2 THE COURT: That's fine. On a bench trial that's
3 fine. I don't like running the risk that something shows up
4 in a chalk and it ends up not coming into evidence in front
5 of a jury. If it ends up not being appropriate for me to
6 consider, I'll compartmentalize and disregard it. I'm fine
7 with chalks. Anything else?

8 MR. MORIN: We want to thank the Court for your
9 time today and opposing counsel on the other side also. This
10 is going to be a new one for all of us.

11 THE COURT: We will be flexible and kind to each
12 other as we go as long as it sort of stays within the bounds
13 of reasonable of something so new.

14 MR. SHANNON: Your Honor, have you determined, and
15 if you did, I missed it, what the typical trial day will be?
16 I know we're starting at 10:00 on the first day. Are you
17 imagining three-hour days, five-hour days, six-hour days?
18 Don't know?

19 THE COURT: I don't know. And I'm willing to vary
20 it up by the day. We can talk about it as we go. On that
21 first day we'll start at 10, probably go to 12, take a half
22 hour break for lunch if that works for people. We can take a
23 longer break if you want. That's two hours. Do you guys
24 want a half hour break or hour break for lunch?

25 MR. MORIN: Half hour.

1 MR. FRAZIER: A half hour is fine, Your Honor.

2 THE COURT: Let's say we go from 10 to 12. We take
3 a break from 12 to 12:30. We go from 12:30 to 2:30. Then
4 let's see where we are. If we're in the middle of a witness,
5 and it's going to be another hour and my kids are not in
6 school, I'm happy to keep going. If I have to go get them, I
7 have to get them. Let's play it by ear. Figure at least 10
8 to 2:30.

9 MR. MORIN: Your Honor, if I could bother you on
10 this. I know everyone on our side would be happier to do
11 longer days to get the trial done in time. We're happier to
12 do longer days. I take it from your comment earlier it's
13 possible we may run a day or two beyond the two weeks but not
14 beyond that.

15 I'd just ask for scheduling purposes for not only
16 attorneys, we're secondary, but clients and witnesses, we
17 won't go longer than a couple days past two weeks at the
18 most. Is that fair?

19 THE COURT: I don't have a trial scheduled the week
20 after. I am uncertain about how much technology is going to
21 delay us. So I'm thinking about something like the 50 hours,
22 and if there are things that push that off, it's fine. In
23 all candor, some of those things that push us off might be
24 me. I have no idea what my kids' schedules are going to be.
25 It's hard for me to predict what those weeks are going to

1 look like at this exact moment. I am also happier to go
2 longer days. For example, if we're coming to an end of a
3 witness, if it looks like we can finish a witness if we go
4 another hour and hour and a half, that's what I'm going to
5 do. I just don't know what my life is going to look like in
6 mid September. I'm going to hold off on making a firm
7 schedule, but I am amenable for longer days.

8 MR. MORIN: It's 2020. I don't think any of us
9 knows, Your Honor.

10 THE COURT: My nanny just had a baby. I have a lot
11 on my table. The Massachusetts Domestic Workers Rule has
12 excluded me from finding a new nanny. I'm sort of flying
13 blind here. My kids are in public school. I don't know if
14 they're going to be remote. I don't know if they're going to
15 school two days a week. I'm having a hard time firming up my
16 schedule.

17 My normal trial day is 10 to 4. I don't know if I
18 have the stamina on a bench trial on a patent case with only
19 a half hour for lunch to go 10 to 4 every day, but I can go
20 10 to 4 a lot of days, but I'm reluctant to commit to that.
21 One way or another that week is the first week of the kids'
22 school, and I need to be a little flexible to figure out what
23 we're doing.

24 MR. MORIN: We'll make it stimulating and
25 interesting. You'll just hate turning off the computer every

1 day.

2 THE COURT: Famous last words. If you need
3 anything, talk to Karen. She knows how to get ahold of me.
4 Otherwise we'll see you on the 14th. Thanks, everyone.

5 (Court recessed at 11:21 a.m.)
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CERTIFICATION

I certify that the foregoing is a correct
transcript of the record of proceedings in the above-entitled
matter to the best of my skill and ability.

/s/ Joan M. Daly

September 19, 2020

Joan M. Daly, RMR, CRR
Official Court Reporter

Date